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999 E Street, NW
Washington, DC 20463

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FIRST GENERAL COUNSEL'S REPORT

CELA

SENSITIVE

MUR: 6771

DATE COMPLAINT FILED: January 9, 2014

DATE OF NOTIFICATION: January 14, 2014

DATE OF LAST RESPONSE: May 16, 2014

DATE ACTIVATED: June 17, 2014

ELECTION CYCLE: 2010

EXPIRATION OF SOL:

March 3, 2016 (earliest)

January 14, 2019 (latest)

COMPLAINANT:

Dave Buell

RESPONDENTS:

Sue Lowden for US Senate and Chris Marston
in his official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS:

52 U.S.C. § 30104(b)(8)¹

11 C.F.R. § 104.3(d)

11 C.F.R. § 104.11(a)

11 C.F.R. § 116.1(d)

11 C.F.R. § 116.10(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Sue Lowden for US Senate ("Committee") violated the Act and Commission regulations by failing to report over \$77,000 in outstanding debts owed to Vitale & Associates, LLC ("Vitale"), a Colorado-based polling and public affairs company. Compl. at 1 (Jan. 9, 2014). The Committee responds that no contract existed in connection with the alleged debt and that it does not believe that the amount "constitutes a debt that is required to

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

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1 be reported to the Commission as a 'disputed debt.'" Resp. at 1-2 (May 16, 2014). Further, it
2 explains that the alleged debt is currently the subject of litigation, and that in January 2014, the
3 Committee amended its disclosure reports to show the debt as a disputed debt, but did so "simply
4 to expedite the termination of the Committee." *Id.* Thus, the Committee requests that the
5 Commission dismiss this matter. *Id.* at 3.

6 It appears that the Committee violated the Act by failing to continuously report a debt,
7 disputed or otherwise. Nevertheless, as discussed below, we recommend that the Commission
8 exercise its prosecutorial discretion to dismiss this matter, close the file, and caution the
9 Committee regarding the debt reporting rules. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

10 II. FACTUAL BACKGROUND

11 Sue Lowden was a candidate for U.S. Senate in the 2010 Republican primary election in
12 Nevada, and the Committee was her authorized campaign committee.² During the election, the
13 Committee used Vitale as one of its vendors. Specifically, the Committee's 2010 April
14 Quarterly Report disclosed making payments to Vitale for "Survey Research" on February 10
15 and March 23, 2010, in the amounts of \$20,982.59 and \$21,330.94, respectively.³ The
16 Committee's next two filed reports — the 2010 July and October Quarterly Reports — disclosed
17 a separate debt to Vitale in the amount of \$77,796.88 for "Survey Research."⁴

18 In the fall of 2010, Vitale reportedly filed a civil lawsuit against Lowden in Colorado
19 state court for payment of the alleged debt that appeared on the Committee's original 2010 July

² Lowden lost the June 8, 2010, primary election.

³ See <http://docquery.fec.gov/pdf/180/10020293180/10020293180.pdf> at 330 and 344.

⁴ See <http://docquery.fec.gov/pdf/441/10020544441/10020544441.pdf> at 204, and
<http://docquery.fec.gov/pdf/035/10020963035/10020963035.pdf> at 40.

1 and October Quarterly Reports.⁵ On March 3, 2011, while the lawsuit was still pending, the
2 Committee filed its next disclosure report — the 2010 Year End Report — which disclosed no
3 debt to Vitale, and no payments to Vitale indicating that the \$77,796.88 debt disclosed in the
4 previous reporting period had been repaid. Thereafter, none of the Committee's filings in 2011,
5 2012, and 2013 disclosed any debt owed to Vitale. Further, on April 14, 2011 and May 3, 2012,
6 respectively, the Committee amended its 2010 October and July Quarterly Reports to delete the
7 debt to Vitale that it had disclosed on its original reports.

8 On August 8, 2012, Vitale filed a second lawsuit against Lowden focusing on the same
9 alleged debt in federal court in Nevada, after the Colorado state court reportedly dismissed the
10 prior Vitale lawsuit on jurisdictional grounds.⁶ See *Vitale & Associates, LLC v. Sue Lowden*,
11 Case No. 2:12-cv-01400-JCM-VCF (D. Nev. Aug. 8, 2012). This lawsuit is still pending. On
12 January 14, 2014, the Committee amended its 2010 July Quarterly Report and all subsequent
13 reports to include a \$77,796.88 debt with Vitale with the notation, "disputed debt—currently in
14 litigation in NV Federal Court."⁷

⁵ See Penny Parker, *Parker: Vitale Sues Nev. Politician*, DENVERPOST.COM (Mar. 8, 2011), available at http://www.denverpost.com/pennyparker/ci_17560418 (attached to Complaint); Norm Clarke, *Ex-Candidate Faces a Couple of Lawsuits*, LAS VEGAS REVIEW-JOURNAL (Dec. 5, 2010), available at <http://www.reviewjournal.com/norm-clarke/ex-candidate-faces-couple-lawsuits>. We have been unable to determine the exact date that the reported lawsuit was filed, but it appears based on the news articles, that it was likely filed in October 2010; it is unclear whether the lawsuit was filed before or after the Committee filed its 2010 October Quarterly Report on October 22, 2010.

⁶ See Steve Green, *Former Senate Candidate Sue Lowden Sued Over Alleged Unpaid Campaign Bill*, LAS VEGAS SUN (Aug. 8, 2012), available at <http://www.lasvegassun.com/news/2012/aug/08/former-senate-candidate-sue-lowden-sued-over-alleg/> (attached to Complaint). We have been unable to determine when the reported lawsuit was dismissed.

⁷ The Committee asserts that it amended its disclosure reports before it received notification of the Complaint in this matter — the notification letter was not mailed to the Committee until January 14, 2014, the same day the Committee amended its reports. Further, all of the Committee's disclosure reports filed on or after January 14, 2014, including the Committee's most recent report, its 2014 July Quarterly Report, include the Vitale disputed debt. See Amended 2010 July Quarterly Report at 33, available at <http://docquery.fec.gov/pdf/834/14020012834/14020012834.pdf>; July Quarterly Report at 15, available at <http://docquery.fec.gov/pdf/581/14020621581/14020621581.pdf>.

1 The Complaint in this matter, filed January 9, 2014, alleges that the Committee violated
2 Commission regulations by omitting the Vitale debt from its disclosure reports, beginning with
3 its Amended 2010 July and October Quarterly Reports and continuing with all subsequent
4 reports. Compl. at 1-2. The Complaint maintains that Lowden and the Committee do not deny
5 that the debt is owed. *Id.* at 1.

6 In response, the Committee argues that it has not violated the Act or Commission
7 regulations and requests that the Commission dismiss the matter.⁸ The Committee states that the
8 alleged debt to Vitale is currently the subject of litigation and asserts that it did not enter into
9 either an express or implied contract for the performance of the polling services that Vitale
10 claims were provided. Resp. at 1-2. The Committee also asserts that given its belief that no
11 contract or agreement ever existed, it reasonably believed the alleged debt was not reportable to
12 the Commission as a "disputed debt" pursuant to 11 C.F.R. § 116.10. *Id.* Further, the
13 Committee explains that it amended the 2010 July Quarterly Report and all subsequent reports to
14 reflect the \$77,796.88 Vitale invoice as a "disputed debt -- currently in litigation in NV Federal
15 Court," and that the Committee did so "out of an abundance of caution," given that the 2012
16 lawsuit "elevated the issue to a 'bona fide disagreement' that could fall within 11 C.F.R. § 116 *et*
17 *seq.*" *Id.* at 2-3. The Response does not address the fact that the Committee disclosed the debt to
18 Vitale on its original 2010 July and October Quarterly Reports and then failed to disclose any

⁸ The Committee notes that its most recent filing at the time of the Response — the 2014 April Quarterly Report — reflects a cash-on-hand balance of \$0. *Id.* at 3. The Committee's 2014 July Quarterly Report, its most recent report, also discloses a \$0 cash-on-hand balance. *See* <http://docquery.fec.gov/pdf/581/14020621581/14020621581.pdf> at 2. The Committee has been working with the Reports Analysis Division ("RAD") for an extended period of time to terminate the Committee. On January 14, 2014, the same day it amended all of its relevant disclosure reports to reflect the disputed Vitale debt, the Committee filed a new proposed comprehensive Debt Settlement Plan reflecting the disputed Vitale debt. Resp. at 2. This is one of several proposed Debt Settlement Plans that the Committee has filed with the Commission since October 14, 2011. The Committee's Debt Settlement Plan process is ongoing; on August 26, 2014, RAD referred the Committee's proposed Debt Settlement Plan to the Office of General Counsel for review. *See* Memorandum from Lisa J. Stevenson, Deputy General Counsel-Law, FEC, to Patricia C. Orrock, Chief Compliance Officer, FEC (Aug. 26, 2014).

1 debt to Vitale on its subsequent reports until it amended them in January 2014. Nor does the
2 Response mention the 2010 state lawsuit that Vitale reportedly filed against the Committee.

3 **III. LEGAL ANALYSIS**

4 The Act and Commission regulations require political committees to continuously report
5 the amount and nature of their outstanding debts until those debts are extinguished. 52 U.S.C.
6 § 30104(b)(8) (formerly 2 U.S.C. § 434(b)(8)); 11 C.F.R. §§ 104.3(d), 104.11(a). Further, where
7 there is a "disputed debt," the political committee must report the disputed debt if the creditor
8 has provided "something of value" to the political committee. 11 C.F.R. § 116.10(a). A
9 "disputed debt" is "an actual or potential debt or obligation owed by a political committee,
10 including an obligation arising from a written contract, promise or agreement to make an
11 expenditure, where there is a bona fide disagreement between the creditor and the political
12 committee as to the existence or amount of the obligation owed by the political committee." *Id.*
13 § 116.1(d). Until the dispute is resolved, the political committee must disclose any amounts paid
14 to the creditor, any amount the political committee admits it owes, and the amount the creditor
15 claims is owed. *Id.* § 116.10(a).

16 Here, it appears that the Committee had either an actual or disputed debt with Vitale. The
17 Committee's original 2010 July and October Quarterly Reports, which collectively cover a six-
18 month time period, disclosed the \$77,796.88 amount at issue as an actual debt to Vitale for
19 "Survey Research." At the time the Committee filed each report, there was no indication that it
20 was a disputed debt. This suggests that the Committee acknowledged, at least at the time it filed
21 the original 2010 July and October Quarterly Reports, that it had an actual debt with Vitale for
22 the reported amount. However, the Committee now asserts that it does not owe a debt to Vitale,
23 and the Commission need not reach the question whether there was an actual debt because the

1 available information shows that this amount was, at the very least, a disputed debt that likewise
2 requires disclosure.

3 Specifically, Vitale's legal actions against the Committee suggest the existence of at least
4 a disputed debt. In 2010, Vitale reportedly sued Lowden to collect the \$77,796.88 that it claims
5 it is owed. The lawsuit indicates a "bona fide disagreement between the creditor and the political
6 committee as to the existence or amount of the obligation owed by the political committee." *See*
7 11 C.F.R. § 116.1(d). The Committee itself seems to generally concede that a lawsuit over an
8 alleged debt establishes a "bona fide disagreement" that triggers disclosure of that amount as a
9 disputed debt. In its Response, the Committee, without acknowledging the 2010 state lawsuit,
10 explains that Vitale's 2012 federal lawsuit triggered its subsequent disclosure of the Vitale debt
11 as disputed given that the 2012 lawsuit "elevated the issue to a 'bona fide disagreement' that
12 could fall within 11 C.F.R. § 116 *et seq.*" *Id.* Resp. at 2.

13 And the available information suggests that Vitale had provided "something of value" to
14 the Committee. *See* 11 C.F.R. § 116.10(a). The Committee already had an established vendor
15 relationship with Vitale — it made disbursements to Vitale for "Survey Research" before, in the
16 amounts of \$20,982.59 on February 10, 2010, and \$21,330.94 on March 23, 2010. And indeed,
17 the Committee does not assert that Vitale provided no services to the Committee in exchange for
18 the amount that Vitale claims it is owed, stating instead that "the services were never requested
19 or contracted for." Resp. at 1. The Committee merely explains, "[i]t is undisputed that no
20 written contract exists between the Committee and Vitale & Associates, LLC and the alleged
21 existence of an oral or implied contract is currently being litigated." *Id.* Thus, we can
22 reasonably conclude that Vitale provided something of value to the Committee, thereby requiring
23 that the Committee continuously report the disputed debt until the dispute is resolved. *See*
24 11 C.F.R. §§ 116.1(d), 116.10(a).

1 Notwithstanding the Act's requirement that it do so, the Committee did not continuously
2 disclose the debt to Vitale, whether disputed or not. *See* 52 U.S.C. § 30104(b)(8) (formerly
3 2 U.S.C. § 434(b)(8)); 11 C.F.R. §§ 104.3(d), 104.11, 116.10(a). Although the Committee
4 disclosed the debt on its original 2010 July and October Quarterly Reports, it did not disclose the
5 debt, disputed or otherwise, on subsequent reports starting with its 2010 Year End Report, filed
6 on March 3, 2011. Thereafter, none of the Committee's filings in 2011, 2012, and 2013 —
7 including its April 14, 2011 and May 3, 2012, amendments to its 2010 October and July
8 Quarterly Reports, respectively — disclosed any debt owed to Vitale. Only later, in January
9 2014, did the Committee amend its reports, starting with the 2010 July Quarterly Report, to
10 disclose a disputed debt to Vitale. Thus, the Committee did not continually disclose a debt or
11 disputed debt to Vitale from March 3, 2011, to January 14, 2014. Therefore, it appears that the
12 Committee violated 52 U.S.C. § 30104(b)(8) (formerly 2 U.S.C. § 434(b)(8)).

13 Nevertheless, we do not believe that pursuing an enforcement action on these facts is a
14 worthwhile use of the Commission's resources. *See* Statement of Policy Regarding Commission
15 Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545-
16 46 (Mar. 16, 2007). The Committee timely disclosed the alleged debt to Vitale when it was
17 originally incurred. Further, the Committee eventually amended all of its disclosure reports to
18 reflect the debt, asserts that it did so before it learned of the Complaint, and is now essentially
19 defunct and intends to terminate. Based on these considerations, we recommend that the
20 Commission exercise its prosecutorial discretion to dismiss the allegation and close the file, but
21 caution the Committee regarding the Act's requirements for disclosing debts. *See Heckler*, 470 U.S.
22 at 831.

IV. RECOMMENDATIONS


1. Dismiss with caution the allegation that Sue Lowden for US Senate and Chris Marston in his official capacity as treasurer violated 52 U.S.C. § 30104(b)(8) (formerly 2 U.S.C. § 434(b)(8)).
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.


Daniel A. Petalas
Associate General Counsel

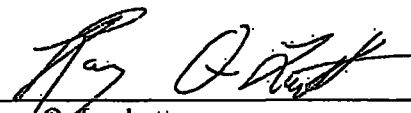
Date

9-10-14

BY:


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